In the United States District Court for the Southern District of Ohio, Western Division

Civil Action No. 2164

THE EMERY TRANSPORTATION COMPANY, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree of the District Court be affirmed. This is a direct appeal from the final judgment and decree, entered on February 14, 1950,[1] by a specially constituted district court of three judges established pursuant to Section 2284, Title 28 of the United States Code, dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on March 8, 1950, and appeal papers were served on March 8, 1950.

[1] The Court entered no opinion but made and entered Findings of Fact and Conclusions of Law on February 14, 1950.

The Commission's order dated July 6, 1949 required appellant to cancel a proposed schedule of minimum truck-load rates on specific commodities from Jeffersonville, Indiana, to Chicago, Illinois, and from Chicago to specific destinations in Wisconsin. By these rates filed pursuant to Section 218 of the Interstate Commerce Act (49 U. S. C. 318), appellant proposed to establish new reduced contract carrier minimum charges for the transportation of soap, soap powders and toilet articles on routes between the above-described points.

Appellant is a contract carrier holding permits issued pursuant to Section 209 of the Act (49 U. S. C. 309) authorizing it to operate as a motor contract carrier over irregular routes in the transportation of (1) soap, soap powders and toilet articles from Jeffersonville, Indiana, to Chicago, Illinois, and (2) such merchandise as is dealt in by wholesale food business houses from Chicago to all points in Wisconsin. These separate operating rights, among others, were acquired by the appellant through separate purchases authorized in Commission proceedings entitled *Emery Transportation Co.—Purchase—Nowak Trucking Co.*, 40 M. C. C. 835 and 45 M. C. C. 805, and *Emery Transportation Co.—Control and Merger*, 50 M. C. C. 43.

On March 14, 1949 Division 2 of the Commission filed its report [2] and order in which it found that the proposed schedule of minimum rates were

[2] 49 M. C. C. 176.

BLEED THROUGH POOR COPY

proportional rates[3] designed to apply on through shipments from Jeffersonville, Indiana, to destinations at points in Wisconsin and as such were applicable to transportation in excess and beyond the scope of appellant's operating rights.

Appellees submit that this appeal presents no substantial questions. The issue presented is whether a contract carrier possessing separate operating rights can without obtaining specific operating authority therefor[4] combine the same so as to render through service between the origin point on one route and the destination points on the other. If such action by the contract carrier is not recognized or permitted by the provisions of the Act, the schedule of rates applicable to such

[3] The Commission found:

The proposed minimum rates would apply only on through shipments from Jeffersonville to the destinations in Wisconsin. Although separate contracts are entered into between the respondents and the shipper for the transportation to Chicago and beyond Chicago, the shipments are not rehandled at Chicago. They move through to destinations in the same vehicle. It is the intention of the shipper that its shipment shall move through to the destinations in Wisconsin when they leave Jeffersonville. (49 M. C. C. 176, 177.)

The proposed minimum rates are proportional rates. They are factors of through rates which are intended to apply on traffic on which through service would be performed. (49 M. C. C. 176, 180.)

[4] As stated on page 45 of the transcript of argument before the Commission, there was pending before the Commission but undecided at that time an application filed by appellant seeking a permit authorizing it to perform the through service covered by the rates here involved.

through service was properly rejected by the Commission.

Decisive of the matter here presented is the fact that Section 209 of the Act (49 U. S. C. 309) prohibits the performance of interstate commerce by a contract carrier unless such carrier has first obtained from the Commission a permit evidencing the authority to conduct the particular type of operation it intends to perform. Subsection (b) of said Section 209 requires the Commission to "specify in the permit the business of the contract carrier covered thereby and the scope thereof * * *."

The Commission has consistently held that a contract carrier cannot, without specific authority therefor granted in its permit, combine or "tack" (the term generally used) operating rights or routes and render through service between points described in its separate operating rights.

In its most recent restatement of this doctrine, *Service of Contract Carriers,* 49 M. C. C. 103, 105–6, the Commission said:

> Ordinarily the question of "tacking" of operating rights is not involved in applications filed under section 209 of the act, because applicants for contract-carrier authority have almost without exception sought authority to perform a complete service for the shipper without regard to their existing authority. In those few instances where this was not done, division 5 has consistently adhered to the policy that

BLEED THROUGH POOR COPY

a contract carrier could not "tack" new routes or rights to existing authority. The leading case on this question is ***Longshore Extension—Salem—Youngstown, Ohio,*** 43 M. C. C. 755, wherein that division said at pages 758 and 759:

No provision is made in the act for the establishment by contract carriers of through routes or joint rates with other such carriers or with common carriers, or for a single contract carrier to render through service between points specified in separate authorities held by it. Compare *Chicago and Wisconsin Points Proportional Rates,* 17 M. C. C. 573, 577. On the contrary, the act contemplates that the service of a contract carrier, under a permit held by it, shall be as specified in an individual contract or agreement with the shipper. Such service therefore would seem to be inconsistent with the establishment of through routes or joint rates with other carriers, or with performance by a single carrier of through service under two or more separately granted permits. Section 209 (b) of the act provides, in part, that we shall specify in the permit "the business of the contract carrier covered thereby and the scope thereof." This phrase is all-inclusive and connotes in addition to the business of being a contract carrier the exact and precise character of the service to be rendered by such carrier. *Keystone Transp. Co. Contract Carrier Application,* 19 M. C. C. 475, 493. In other

> words, we consider that each permit granted by us should describe fully the particular service to be performed for otherwise the permit would not specify "the exact and precise character of the service to be rendered." * * * For example, if a contract carrier were issued a permit to operate from A to B and later was issued a permit to operate from B to C, the two authorities granted would not enable the carrier to provide service from A through B to C. Nor has a contract carrier holding a permit to operate [,] to use the same illustration, from A to B and which acquires, under section 5 or 212 (b) of the act, the contract-carrier authority of another carrier operating, from B to C, been allowed to join the connecting contract-carrier rights so as to render through service. See *Clare M. Marshall, Inc., Purchase—Cunningham,* 36 M. C. C. 507, *Marion Trucking Co., Inc.—Purchase—Martz,* 37 M. C. C. 305.

In *Noble* v. *United States,* 319 U. S. 88, 92–93, the Court agreed with the views of the Commission as expressed in the *Keystone* report, *supra,* that the provision in Section 209 (b) requiring the Commission to specify in the permit "the business of the contract carrier covered thereby and scope thereof," meant that the terms of the permit should describe "the exact and precise character of the service to be rendered," and held that the performance of a greater or different

BLEED THROUGH POOR COPY

type of service would have to be the subject of an additional grant of authority by the Commission.

Whereas, Section 216 (c) of the Act (49 U. S. C. 316 (c)) provides that common carriers of property by motor vehicle may establish through routes and joint rates, similar authority has not been granted to contract carriers by the Act, which is silent with respect to them. In *Acme Fast Freight* v. *United States*, 309 U. S. 638, this Court affirmed a decision of a District Court holding that the provisions of that section, applying only to common carriers, were exclusive. *Acme Fast Freight* v. *United States*, 30 F. Supp. 968, 973.

As this Court said in *United States* v. *Rosenblum Truck Lines, Inc.*, 315 U. S. 50, 53:

> The question here, as in any problem of statutory construction, is the intention of the enacting body. Congress has set that forth for us broadly in the declaration of policy—in essence it is the regulation of transportation by motor carriers in the public interest so as to achieve adequate, efficient, and economical service. To implement that policy Congress forbade common carriers by motor to operate in interstate commerce without securing a certificate of public convenience and necessity from the Commission, and required contract carriers to secure a permit from that body.

The decisions of this Court support the Commission's consistent interpretation of the statute, and the appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

ALBERT B. ROSENBAUM,
GLEN S. STEPHENS,
Attorneys for Regular Common Carrier Conference of the American Trucking Assns., Inc., et al., Intervening Defendants.

DAVID AXELROD,
Attorney for Central States Motor Freight Bureau, Inc., and Motor Carriers Conference of Illinois, Inc., Intervening Defendants.

MARCH 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1950

BLEED THROUGH POOR COPY